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MICHAEL RODA

No.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1298

OBERT CHERRY, et al.,

Petitioners,

vs.

ONALD C. SMITH and
JOHN CHESTER,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE PETITIONERS

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The Scheffer Press, Inc.—(312) 263-6850

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IN THE

EME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

) C. SMITH and JOHN CHESTER,

Respondents,

vs.

CHERRY, MARTIN TUCHOW, SEYMOUR
, EDMUND KELLY, JOHN MERLO, BEN
ER, STANLEY T. KUSPER, JR., FRANCIS
NARY, MARIE H. SUTHERS and JOHN
S,

Petitioners.

Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONERS

OPINION BELOW

pinion of the Court of Appeals, No. 73-1330 er's Appendix pp. 1a-8a) is not reported as date.

JURISDICTION

dgment of the Court of Appeals for the Seventh uit was entered on November 27, 1973. This petition filed within ninety days of that date. This Court's sdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Were the rights of a losing Democratic primary lidate violated when the winning candidate later with- v and then the Democratic Committeemen, in accor- ce with the Illinois law, selected a substitute candidate he general election?

Does the Federal District Court have jurisdiction set aside a general election for an Illinois senate where the plaintiff merely alleges "upon information belief" that a conspiracy took place in the state pri- y election? The alleged consipiracy complained of is the winning Democratic primary candidate never ly intended to run in the general election but ran only a stand in candidate.

STATEMENT OF FACTS

obert Cherry, a member of the Illinois Legislature tinually since 1954 and one of two incumbent State ators residing in the 12th Senatorial District of the te of Illinois, was a candidate for the office of State ator in the Democratic Primary in the 12th Senatorial trict held on March 21, 1972. Cherry received 16,304 es or approximately 53% of the total vote cast, there- defeating his opponent, the Plaintiff, Ronald C. Smith, luly certified candidate for the nomination, who re- ved 14,351 votes or approximately 47% of the votes t. Cherry was thereafter certified as the winner of the mary.

r, the other incumbent State Senator residing
Senatorial District, did not seek renomination.
been a State Senator since November, 1970
Senatorial District, but because of a new
plan adopted in 1971, Palmer's residence
er located in the new 12th Senatorial District.

ut September 21, 1972, Senator Cherry with-
gned his candidacy as the Democratic Party
r State Senator for the 12th District. Pur-
ap. 46, Sec. 8-5 (Ill. Rev. Stats.) and Chap.
7 (Ill. Rev. Stats.)*, Robert Cherry, Martin
mour Simon, Edmund Kelly, and John Merlo,
Ward Committeemen who comprise the Sena-
ittee for the 12th Senatorial District, selected
as the substitute candidate to fill Senator
acancy.

r 19, 1972, Ronald C. Smith, the losing candi-
March primary, and John Chester, a voter
Senatorial District, filed their amended com-
ing upon information and belief that Cherry
ded to run for State Senator if he won the
but instead planned to withdraw. The com-
er alleges that Messrs. Cherry, Tuchow, Simon,
Merlo, or two or more of them, prior to March
greed, planned, confederated and conspired to
substitute candidate to run for State Senator
Cherry's resignation.

ary 6, 1973, Judge Thomas R. McMillan dis-
Plaintiff's amended complaint stating that,
cannot find any unlawful acts alleged against

fs do not challenge the constitutionality of
§8-5 and 8-17.

laintiff Smith as a candidate or against the plain-
Chester as a voter. In fact, I can perceive that the
ssful candidates Cherry and Palmer and ther sup-
rs at the polls would have a considerably stronger
aint than the Plaintiffs, were either or both of these
ons to be set aside".

REASON FOR GRANTING THE WRIT

e decision of the Seventh Circuit has placed the
al courts in a position of having to review any and
local election and has thereby established a basis
ture intervention that will be completely unworkable.

ARGUMENT

ffs allege "upon information and belief" acy was committed when the winning Demo- for the Illinois senate seat withdrew his or to the general election and a substitute selected in accordance with Illinois law.

ns are made by the plaintiffs that the selec- ubstitute candidate was not done properly ance with Illinois law. The Seventh Circuit where federal intervention has been held ate election involving racial discrimination, Fourteenth Amendments of the Constitu- on 1983 of the Civil Rights Act should also lleged discrimination by a losing candidate .[1] Thus the federal court is now entrusted local election issue no matter how con- pothetical.

w pending before this Court the case of *Jnited States,* No. 73-346, wherein a writ as been granted. The basis issue raised by s in their petition for writ of certiorari not an alleged conspiracy in a local election federal offense.

last ninety days the Supreme Court has decisions wherein federal intervention has or limited. In the case of *O'Shea* v. *Little-* (decided January 15, 1974) the plaintiffs local officials discriminate against them

ien v. *Brown,* 409 U.S. 1, 4, n.1. (Appendix

because of their race by setting higher bonds and imposing harsher sentences in criminal cases than was done for other defendants. This Court held that, "the injury or threat of injury must be both 'real and immediate' not 'conjectural' or 'hypothetical.'" The Court further stated that "a federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable." Thus the plaintiffs in the case at bar are asking the federal courts to (1) void the general election and then (2) to order a second primary to then be followed by a second general election—all being sought on the basis of a complaint based upon information and belief.

The Court of Appeals stated, "the fact that this controversy involves political matters is an insufficient reason for abstaining." (Appendix page 5a). In making such holding the Court cited several cases including *Kusper* v. *Pontikes*, 345 F. Supp. 1104, 1107 (N.D. Ill. 1972, three judge court). This Court on November 19, 1973 applying the doctrine of abstention overruled the *Kusper* case, No. 71-1631.

The decision of the Seventh Circuit has established a basis for federal intervention that is contrary to recent decisions of the United States Supreme Court and for that reason the writ of certiorari should be granted and the decision of the Court of Appeals reversed.

CONCLUSION

It is respectfully submitted that the judgment of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

EPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

O. 73-1330
ONALD C. SMITH and JOHN CHESTER,
Plaintiffs-Appellants,
v.
OBERT CHERRY, MARTIN TUCHOW, SEYMOUR SIMON, EDMUND KELLY, JOHN MERLO, BEN PALMER, STANLEY KUSPER, FRANCIS P. CANARY, MARIE SUTHERS and JOHN LEWIS,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72-C-2368
THOMAS R. MCMILLEN, *Judge.*

EARD SEPTEMBER 26, 1973—DECIDED NOVEMBER 27, 1973

Before O'SULLIVAN, *Senior Circuit Judge,** KILEY and UMMINGS, *Circuit Judges.*

PER CURIAM. This appeal is from the district court's dgment granting defendants' motions to dismiss the first nended complaint, as amended, for failure to state a aim upon which relief can be granted. That pleading,

* Senior Circuit Judge Clifford O'Sullivan of the Sixth ircuit is sitting by designation.

the allegations of which must presently be taken as true, discloses the following:

Plaintiff Ronald C. Smith was a candidate in the March 21, 1972, Democratic primary for the office of state senator from the 12th Illinois Senatorial District. The other plaintiff, John Chester, was a duly qualified voter in that District and voted in that primary.

The present 12th Senatorial District was created through redistricting in 1971. Defendant Robert Cherry was the incumbent state senator in that District and was on the ballot as Smith's opponent in the Democratic primary. Cherry won the primary by a margin of 1,953 votes, receiving 53% of the total vote cast.

Since November 1970, defendant Ben Palmer had been the Democratic state senator from the 13th Senatorial District. Because of the 1971 redistricting, his residence was located in the new 12th District. He did not seek renomination in the 1972 primary election but supported Cherry.

Upon plaintiffs' information and belief, Cherry did not intend to run for state senator in the November 7, 1972, election. Palmer and the five defendant Democratic Ward Committeemen (including Cherry) comprising the statutory 12th Senatorial Committee (Ill. Rev. Stats. 1971, Ch. 46, § 8-5) allegedly conspired to defeat Smith by having Cherry run against him in the Democratic primary as a sham or stand-in candidate. On September 21, 1972, Cherry withdrew his candidacy, so that the defendant Senatorial Committeemen could designate Palmer as the Democratic candidate for state senator from the 12th District in the November 7, 1972 election, as permitted by Ill. Rev. Stats. 1971, Ch. 46, § 8-17. At the November 7 election, Palmer defeated his Republican opponent.

According to the plaintiffs, Chester and all other voters participating in the Democratic primary for the 12th Senatorial District were denied their right to vote as protected by the First and Fourteenth Amendments.

ndants' actions were depicted as "a step in the scheme
ie said defendants to nullify the right of the voters
ecide who would be nominated, to render the primary
ion a sham, and arrogate to the defendant Committee-
the selection of the nominee." Smith was said to
been deprived of his freedom to participate in the
ary "without unlawful interference by the defendant
mitteemen acting under color of law," thus violating
First and Fourteenth Amendments.

deral jurisdiction was invoked under Section 1983
ie Civil Rights Act (42 U.S.C. § 1983) and the First
Fourteenth Amendments. Plaintiffs request declara-
relief, including a declaration that the office of
senator of the 12th District was vacant. In the
native, the district court was requested to order an
special primary and general election for that office.

iginally the district court denied the defendants'
ons to dismiss, stating:

"But what they [plaintiffs] are alleging, in effect, is that there was a fraud made on the voters and that, in effect, Mr. Cherry was not really the candidate. I have to take the allegations of the complaint as true. I think it is the same as putting * * * a fictitious person on the ballot, if you are to assume that what is alleged there is factual. I do not know whether that can be proved or not, but it does seem to me that that is, at least, prima facie violation of the Federal statutes that have been [orally] cited."[1]

ubsequently the defendants filed answers and the ous parties took depositions. Defendants were granted e to renew their motions to dismiss, and those motions granted in an unreported decision and order of the ict court holding that no impermissible discrimination been shown. The court also expressed its reiactance equire a special election to attempt to unwind the

[1] They were 42 U.S.C. §§ 1983 and 1985, 28 U.S.C. § 1343 C. § 1971.

"tangled skein presented by this case" but did not rely on the abstention doctrine.

While we share the district court's hesitancy to inject the federal courts into local elections, in our view plaintiffs have sufficiently alleged deprivation of their rights under the Consitution and Civil Rights Act. Consequently, the judgment must be reversed and the cause remanded for further proceedings.

Abstention

In this Court, the defendants' briefs have not addressed the question of abstention in any detail.[2] Nevertheless, in the district court, the defendant Committeemen alternatively requested the district court to absain from exercising jurisdiction on the ground that the action involved "solely a matter of Illinois election laws applied to a local Illinois election." Therefore, it is appropriate to discuss abstention. Plaintiffs are not seeking a construction of Ill. Rev. Stats. 1971, Ch. 46, § 8-17, nor is its constitutionality challenged. The gravamen of their claim is that the statute is being administered in an unconstitutional way.

The statute is clear on its face and has been construed literally by the highest state court. *Bergeson* v. *Mullinex,* 399 Ill. 470, 4791480 (1948). Thus, there is no basis for abstention in hopes that the statute can be construed so as to render it unecessary to decide the federal issues. See *Wisconsin* v. *Constantineau,* 400 U.S. 433; *Harmon* v. *Forssenius,* 380 U.S.526. Nor would abstention avoid interference with a complex state program. If the plaintiffs ultimately prevail, the remedy they seek would permit the State to go ahead under the usual state procedures for special elections. Abstention seems particularly inappropriate here where the case will become moot

[2] Defendant Committeemen merely rely on a concurring opinion of Justice Douglas in *Jackson* v. *Ogilvie,* 401 U.S. 904. The briefs of the other defendants cite no abstention authorities.

expiration of Senator Palmer's term. The delays
n abstention could therefore abrogate the remedy
ee *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137,
; *Baggett* v. *Bullitt*, 377 U.S. 360, 378-379;
v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S.
29.

t that this controversy involves political matters
fficient reason for abstaining. *Brown* v. *Chote*,
452; *Moore* v. *Ogilvie*, 394 U.S. 814; *Williams*
, 393 U.S. 23; *Shakman* v. *Democratic Organiza-*
F.2d 267 (7th Cir. 1970); *Kusper* v. *Pontikes*,
pp. 1104, 1107 (N.D. Ill. 1972, three-judge
ffirmed, 42 L.W. 4003; Pell, "Abstention
imose Path By Any Other Name," 21
L. Rev. 926, 967 (1972). Nor does it
at only state offices are affected. *Weisberg* v.
17 F.2d 388 (7th Cir. 1969); *Moore* v. *Kusper*,
256 (7th Cir. 1972); *Briscoe* v. *Kusper*, 435
(7th Cir. 1970); *Weiss* v. *Duberstein*, 445 F.2d
Cir. 1971), certiorari denied *sub nom. Lefkowitz*
409 U.S. 876. Only state elections were involved
tate legislative reapportionment cases, and of
stention has not been considered appropriate
Mahan v. *Howell*, 410 U.S. 315; *67th Minnesota*
ate v. *Beens*, 406 U.S. 187; *Ely* v. *Klahr*, 403
Kilgarlin v. *Hill*, 386 U.S. 120; *Swann* v. *Adams*,
440; *Burns* v. *Richardson*, 384 U.S. 73; *Fortson*
, 379 U.S. 433; *Lucas* v. *44th General Assembly*,
713; *Roman* v. *Sincock*, 377 U.S. 695; *Maryland*
e for Fair Representation v. *Tawes*, 377 U.S.
s v. *Mann*, 377 U.S. 678; *WMCA Inc.* v. *Lomenzo*,
633; *Reynolds* v. *Sims*, 377 U.S. 533; *Baker* v.
U.S. 186.

rien v. *Brown*, 409 U.S. 1, 4, n. 1, the Supreme
st recently pointed out that federal intervention
priate where "claims are made that injury arises
invidious discrimination * * * in a primary con-
in a single state." That is the nub of the present

case. The Court specifically mentioned only racial discrimination, but there is no reason to believe that other forms of forbidden discrimination should be treated differently for abstention purposes. Under these authorities it is apparent that the district court is obligated to resolve whether this Illinois statute has been administered in violation of the First and Fourteenth Amendments and § 1983 of the Civil Rights Act.

Sufficiency of Complaint

In this part of the opinion, we again take the well-pleaded allegations of the amended complaint as true. Plaintiffs claim that all voters in the 12th District, regardless of which candidate they preferred, were denied the right to vote because the Democratic candidate was not actually chosen in the primary but was instead chosen by the conspiring Committeemen. Put another way, Cherry's name on the ballot was said to be a sham intended to deceive the voters. Those who thought they were voting for Cherry were as a practical matter voting for whomever the Committeemen might thereafter select; in effect, votes intended for Cherry were really votes for Palmer. This deception on the face of the ballot clearly debased the rights of all voters in the election. Such an abridgment of the right to vote is impermissible and evinces the sufficiency of this complaint. *Moore* v. *Ogilvie*, 394 U.S. 814, 818; *Reynolds* v. *Sims*, 377 U.S. 533, 555-556; *Williams* v. *Rhodes*, 393 U.S. 23, 30-31; *Shakman* v. *Democratic Organization*, 435 F.2d 267, 270 (7th Cir. 1970).

Plaintiffs also claim that some voters were denied equal protection of the laws. As we understand plaintiffs' equal protection theory, the deliberate discrimination involved three groups of voters. Other groups of voters were also affected, but the conspiracy was aimed primarily at the following three groups:

l for Group	Operational Definition of Group
ion Voters (INS)	Voters who would vote for either Cherry or Palmer
ters	Voters who would vote for Cherry but not for Palmer
ters (OUTS)	Voters who would vote for Smith as against either Cherry or Palmer

n Voters and Swing Voters were both "tricked" or Palmer when they thought they were voting But the impact of this deception fell unequally groups of voters, because the Organization ld have voted for Palmer anyway, whereas Voters would have voted against him.

ing the Swing Voters, the conspiracy allegedly, mer to win an election he could not have won nly been on the ballot. The conspiracy de- h, who allegedly would have won an honest inst Palmer. Thus the conspiracy worked "in ins and against the outs." *Shakman* v. *Demo- nization,* 435 F.2d 267, 270 (7th Cir. 1970). rs and Smith Voters were "denied an equal to win votes" (*Williams* v. *Rhodes,* 393 U.S. suffered an unequal burden on their right eir votes effectively" *Id.* at 30. The Smith e denied an equal opportunity "to associate ancement of political beliefs" with the Swing at 30. These claims of deliberate discrimina- t Swing Voters and Smith Voters stated a tion for violation of rights protected by the tion clause. *White* v. *Snear,* 313 F.Supp. 1100, Pa. 1970).

Other groups of voters were affected by the conspiracy. Presumably there were some voters who would have voted for Palmer but not for Cherry. Taking as true the allegation of the complaint that only Cherry had a reasonable chance to defeat Smith, this group of voters must have been small. Similarly, there must have been voters who had no preference and did not vote in what they thought was a Cherry-Smith race, but would have voted in an open Palmer-Smith race. Doubtless there are other groups of voters with different combinations of preferences. We find it unnecessary at this stage to resolve the possible claims of all possible groups of voters incidentally affected by the discrimination aimed at the Swing Voters and the Smith Voters.

In reversing itself and denying relief to plaintiffs, the district court relied primarily on *Snowden* v. *Hughes*, 321 U.S. 1. There, however, official action discriminated between the candidates with the highest and second highest number of votes, and there was no allegation of improper motive. As the district judge noted, *Snowden* has been "eroded in subsequent voters' rights and election decisions." But even *Snowden* acknowledged that relief under the equal protection clause is appropriate where, as here, plaintiffs have shown a discriminatory design favoring a particular group against others. As Chief Justice Stone stated in language that we followed in *Weisberg* v. *Powell*, 417 F.2d 388, 392 (7th Cir. 1969):

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may*** be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another ***."

discrimination is sufficiently shown, the
elief under the equal protection clause is
shed by the fact that the discrimination re-
olitical rights." 321 U.S. at 8, 11.

oo, it is clear that plaintiff Smith had a
action. As we stated in *Shakman, supra,*
of candidates in official treatment free
al or purposeful discrimination are entitled
ual protection." 435 F.2d at 270. In the
of the record, at least until discovery has
d, it is impossible to determine the merits
versy. It may be that after the remaining
taken place or affidavits filed, the district
be able to resolve the case by summary
herwise, of course, a trial will be neces-
plaintiffs prove an agreement that Cherry
tand-in candidate, and show a reasonable
at Cherry's sham candidacy affected the
he election, then the district court should
imary and general elections.[3] Because the
n in question has already commenced, ex-
ient must be accorded below. Until the dis-
termines the relief, if any, to be awarded
e of the present defendants should be dis-
Michael J. Howlett, John H. Hanly, and
leman should be substituted for their pre-
ffice. Rule 25(d) of Federal Rules of Civil

nd remanded for further proceedings.

election was ordered by this very district
sins v. *City Council,* No. 70 C 3202 (N.D.
r our remand for new trial in 466 F.2d 830,
ed, 409 U.S. 893. New elections were ordered
Adams, 394 U.S. 358, 367, and in *Mann* v.
Supp. 458 (E.D. Va. 1964), affirmed, 379 U.S.
ctions were envisioned as a possibility in
inois State Electoral Board, 307 F.Supp. 691
9, three-judge court).